STATE OF MICHIGAN
IN THE SUPREME COURT

JOSE A. RODRIGUEZ,

Plaintiff/Appellee,

v.

FEDEX FREIGHT EAST, INC., RODNEY ADKINSON, LAURA BRODEUR, MATTHEW DISBROW, WILLIAM D. SARGENT, and HONIGMAN MILLER SCHWARTZ AND COHN LLP, jointly, severally and individually,

Defendants/Appellants.

Supreme Court Case No. 149222

Court of Appeals No. 312187

LC Case No. 09-028366-NO

SUPPLEMENTAL BRIEF OF DEFENDANTS/APPELLANTS

/

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SUPPLEMENTAL BRIEF OF DEFENDANTS/APPELLANTS

ORAL ARGUMENT REQUESTED

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QUESTION PRESENTED FOR REVIEW

Should the trial court's dismissal of plaintiff's complaint be affirmed based upon *Daoud v De Leau*, 455 Mich 181; 565 NW2d 639 (1997)?

I. INTRODUCTION

Plaintiff is a litigant whose bankruptcy estate lost an employment discrimination suit, and who individually lost a separate fraud suit (**virtually identical to the complaint in this case**), on the merits in numerous federal courts. Rather than accepting having lost, he has resurrected his claims yet again in state court by claiming fraud and abuse of process. The instant claims are based upon alleged perjury and forgery, during the employment discrimination suit, by the winning party, one of its witnesses, and its lawyers. The trial court here dismissed plaintiff's complaint with prejudice on the grounds of res judicata and collateral estoppel. The Court of Appeals essentially reinstated most of plaintiff's claims.

Plaintiff alleges two "frauds" relating to the testimony of a single witness, defendant Adkinson, with whom plaintiff does not agree. The testimony was the subject of objections and briefing, cross examination before the jury, multiple post-trial motions, and several unsuccessful appeals. The "fraud" allegations made here have already been considered and rejected by the actual federal courts involved in the underlying employment discrimination case.

Defendants filed their Application for Leave to Appeal ("Application") in this Court seeking to reverse the decision of the Court of Appeals, and to affirm the dismissal of plaintiff's complaint by the trial court, on one or more of the several independent grounds for dismissal established under MCR 2.116(C)(5), (7), and (8). These grounds included res judicata, collateral estoppel, failure to state a claim for fraud or abuse of process, time-bar, and lack of standing. Each of these grounds is briefed in defendants' Application. On October 3, 2014, this Court

directed the Clerk to schedule oral argument on whether to grant the Application or take other action pursuant to MCR 7.302(H)(1). This Court also required the parties to file supplemental briefs addressing the relevance to this case of this Court's decision in *Daoud v De Leau*, 455 Mich 181 (1997).

The Court's October 3, 2014 Order on the Application ("MOAA") directs defendants not to repackage the Application as their supplemental brief. Accordingly, this brief addresses the one issue raised in the Court's MOAA order, and does not repeat what is in the Application. Defendants will assume the Court's familiarity with the Application, and will continue to use the same designations and exhibit citations already established in the Application (i.e., "Rodriguez", "Employment Litigation", "2009 Fraud on the Court Action". . . .). For the reasons below and in the Application, plaintiff cannot maintain his claims, and the trial court's order dismissing those claims with prejudice should be affirmed.

II. *DAOUD* IS RELEVANT AND DISPOSITIVE, REQUIRING THE DISMISSAL OF RODRIGUEZ'S CLAIMS

Rodriguez's complaint alleges that defendants committed fraud and abuse of process during the Employment Litigation based upon: (1) alleged perjured testimony by a FedEx witness Adkinson in an unnotarized affidavit; and (2) the statements of a FedEx lawyer that there was a second identical notarized affidavit (but that such affidavit allegedly had a forged signature of Adkinson). *See*, Application, pp. 10-12; Application, Ex. A – Amended Complaint, ¶¶ 23, 67-84). This alleged conduct resulted in Rodriguez's bankruptcy estate losing some of its alleged claims against FedEx via summary judgment in the Employment Litigation. As fully explained in the Application, Rodriguez raised these issues in the Employment Litigation and the subsequent 2009 Fraud on the Court Action. *See*, Application, pp. 4-10.

A. The Rule of *Daoud*

The rule of *Daoud*, and its predecessor *Triplett v St Amour*, 444 Mich 170; 507 NW2d 194 (1993), "is that a second suit for fraud, based on perjury ('intrinsic fraud'), may not be filed against a person involved in a first suit, if the statutes and court rules provide an avenue for bringing the fraud to the attention of the first court and asking for relief there." *Daoud*, 455 Mich at 203 (emphasis added). This rule bars Rodriguez's complaint here.

The "confluence of principles related to res judicata, collateral estoppel, and proximate cause serve to illustrate the logical underpinnings" of this rule. *Daoud*, 455 Mich at 202. As if having Rodriguez's numerous cases in mind, the *Daoud* Court stated that "[i]f testimony in one suit, accepted by the court but disputed by the losing litigant, can give rise to a second suit, what would prevent a third suit arising from the unsatisfactory outcome of the second? Or a fourth arising from the third?" *Daoud*, 455 Mich at 202. Quoting *Columbia Casualty Co v Klettke*, 259 Mich 564, 565-66; 244 NW 164 (1932), this Court explained in *Daoud*:

> **The courts hold that perjury is intrinsic fraud and that therefore it is not ground for equitable relief against a judgment resulting from it.** We have seen that the fraud which warrants equity in interfering with such a solemn thing as a judgment must be fraud in obtaining the judgment, and must be such as prevents the losing party from having an adversary trial of the issue. Perjury is a fraud in obtaining the judgment, but it does not prevent an adversary trial. The losing party is before the court and is well able to make his defense. His opponent does nothing to prevent it. This rule seems harsh, for often a party will lose valuable rights because of the perjury of his adversary. However, public policy seems to demand that there be an end to litigation. **If perjury were accepted as a ground for relief, litigation might be endless; the same issues would have to be tried repeatedly.** As stated in a leading case, 'the wrong, in such case, is of course a most grievous one, and no doubt the legislature and the courts would be glad to redress it if a rule could be devised that would remedy the evil without producing mischiefs far worse than the evil to be remedied. **Endless litigation, in which nothing was ever finally determined, would be worse than the occasional miscarriages of justice; and so the rule is, that a final judgment cannot be annulled merely because it can be shown to have been based on perjured testimony; for if this could be done once, it could be done again and again *ad infinitum*.'** And to use the language of an eminent court, 'the maxim that fraud vitiates every proceeding must be taken, like other general maxims, to apply to cases where proof of fraud is admissible. But where the

> same matter has been actually tried, or so in issue that it might have been tried, it is not again admissible; the party is estopped to set up such fraud, because the judgment is the highest evidence and cannot be contradicted.'

Daoud, 455 Mich at 193-194, 202 (emphasis added), quoting *Columbia*, 259 Mich at 565-566, citing *Pomeroy's Equitable Remedies* (2d ed), § 656, published as *Pomeroy's Equitable Jurisprudence* (4th ed), § 2077.

B. The Facts of *Daoud* and Its Application to Rodriguez's Claims

Daoud involved the short marriage of Ghassan Daoud and Carmel De Leau. The relevant facts begin with a petition filed by protective services in Ottawa Probate Court. *Daoud*, 455 Mich at 187. This petition attempted to terminate the parental rights of Daoud and De Leau with respect to their son David. *Id.* at 188. The petition said that David had been "abandoned" by Daoud, and that Daoud had been deported and was unlikely to return to the United States. *Id.* at 188. De Leau and Lisa VandeWaa (a representative of an adoption agency) testified that Daoud was in the Middle East, that he could not come back to the United States, and that he had failed to support De Leau and David. *Id.* at 189. De Leau voluntarily terminated her own parental rights, and the probate court terminated Daoud's. *Id.* at 190.

Daoud alleged that he had actually been back in America throughout the probate proceedings. He said that De Leau knew this but failed to inform him about the termination proceeding because she knew that he disapproved. *Id.* at 190. When Daoud learned that his parental rights had been terminated, he took various actions to remedy the situation. First, he filed a motion for rehearing in the probate court. *Id.* The probate court denied Daoud's motion, stating that he had failed to show fraud that warranted setting aside the termination orders. *Id.* at 191. Daoud appealed the probate court order to the Court of Appeals, which denied his appeal as untimely. *Id.* He sought rehearing, which was denied, applied for leave to appeal in the

Supreme Court, which was denied, and filed a complaint for superintending control in the Court of Appeals, which was denied. *Id.*

Then, Daoud filed a fraud suit in Kent Circuit Court—the circuit in which Daoud and De Leau's divorce was finalized—alleging fraud and fraudulent concealment by De Leau, VandeWaa, and the adoption agency, Bethany Christian Services. *Id.* at 192. The defendants moved for summary disposition on the basis of res judicata and witness immunity. *Id.* The circuit court granted the motion, and the Court of Appeals affirmed. *Id.* at 195.

This Court affirmed. It began by recounting the facts and various opinions in *Triplett*. *Id.* at 195. The Court decided *Daoud* on the "narrow principles with which a majority in *Triplett* were in agreement"—principles which govern the disposition of this case as well. *Id.* at 199. The Court held that the "principle teaching of *Triplett* is that the court rules are a primary source for determining the means by which a person aggrieved by a judgment may seek to remedy the situation." *Id.* at 200. The court rules allowed Daoud to remedy his situation in the probate court action, an opportunity of which he took advantage and lost; and there was no need for a separate action for fraud. *Id.* at 200-201. Like in *Columbia Casualty*, the Court focused on the ability of the aggrieved party to get before the same court in the same action, rather than on the intrinsic/extrinsic fraud labels. *Id.* at 201-202.

In *Daoud*, the independent fraud action was barred because MCR 2.612 provided an avenue to bring the fraud to the attention of the judge in the original action. MCR 2.612(C) governing motions for relief from judgment states:

> (C) Grounds for Relief From Judgment.
>
> (1) On motion and on just terms, the court may relieve a party or the legal representative of a party from a final judgment, order, or proceeding on the following grounds:

(a) Mistake, inadvertence, surprise, or excusable neglect.

(b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under MCR 2.611(B).

(c) Fraud (intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

(d) The judgment is void.

(e) The judgment has been satisfied, released, or discharged; a prior judgment on which it is based has been reversed or otherwise vacated; or it is no longer equitable that the judgment should have prospective application.

(f) Any other reason justifying relief from the operation of the judgment.

(2) The motion must be made within a reasonable time, and, for the grounds stated in subrules (C)(1)(a), (b), and (c), within one year after the judgment, order, or proceeding was entered or taken. Except as provided in MCR 2.614(A)(1), a motion under this subrule does not affect the finality of a judgment or suspend its operation.

(3) This subrule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding; to grant relief to a defendant not actually personally notified as provided in subrule (B); or to set aside a judgment for fraud on the court. (Emphasis added).

Likewise, Rodriguez's instant independent action alleging fraud and abuse of process is barred under the rule in *Daoud*, because Federal Rule of Civil Procedure 60 provided an avenue for Rodriguez (which he actually pursued and lost on) to bring the alleged perjury and forgery to the attention of the judge in the original action. Fed R Civ P 60(b)-(d) provides:

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) *Timing*. A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality*. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.[1]

* * *

Rodriguez attempted to bring his 2009 Fraud on the Court Action under **both** Fed R Civ P 60(b)(3) and 60(d), but was unsuccessful, based upon the same allegations he makes here. *See,* Application, Ex. D, pp. 6-7 (The Sixth Circuit's opinion affirming the dismissal of that action stated: "As an initial matter, the district court correctly found that Rodriguez cannot bring his claim of fraud on the court pursuant to Rule 60(b)(3) because Rodriguez filed his complaint approximately four years after the bankruptcy court entered its summary judgment order. Rodriguez failed to comply with the one-year time limit on bringing Rule 60(b)(3) motions imposed by Rule 60(c)(1). Because Rodriguez also brought his claim under Rule 60(d), which

[1] The actual federal courts involved in the Employment Litigation and 2009 Fraud on the Court Action have already held there was no fraud on the court by defendants. *See,* Application, pp. 4-10.

has no time limitation, the sufficiency of his claim is properly analyzed under the standards applicable to Rule 60(d) actions for fraud on the court.").

The rule of *Daoud* is that "a second suit for fraud, based on perjury ('intrinsic fraud'), may not be filed against a person involved in a first suit, if the **statutes and court rules** provide an avenue for bringing the fraud to the attention of the first court and asking for relief there." *Daoud*, 455 Mich at 203 (emphasis added). On its face, the rule does not distinguish between situations involving state and federal "statutes and court rules." The touchstone is simply whether there are **any** such statutes and court rules. Moreover, the state and federal rules here are substantively identical, particularly the provisions relating to fraud, misrepresentation, and misconduct of the adversary. The underlying rationale of the *Daoud* rule is premised on whether the plaintiff could have brought the fraud to the attention of the court in the first action. It is undisputed that Rodriguez could have done so, because he actually did in the Employment Litigation, and did so again to the same judge and courts in the 2009 Fraud on the Court Action.

C. Rodriguez Alleges Intrinsic Fraud So His Claims Are Barred Under *Daoud* And Under Federal Law

Rodriguez has previously and unsuccessfully argued in his 2009 Fraud on the Court Action that he is alleging extrinsic fraud and not intrinsic fraud against the defendants here. (Ex. U, pp. 11-18; Application, Ex. D, pp. 5-10). That distinction should not make a difference to the outcome in this case. Nevertheless, it is expected that he will attempt the same argument here. Any argument by Rodriguez that alleged perjury in the Employment Litigation is not intrinsic fraud, and therefore not subject to the *Daoud* rule for that reason, must fail.

The fraud allegations in *Daoud* involved perjury, a quintessential example of "intrinsic fraud." *See*, *Sprague v Buhagiar*, 213 Mich App 310, 314; 539 NW2d 587 (1995) ("An example of intrinsic fraud would be perjury."). Likewise, the primary basis for both counts of the

complaint here is Rodriguez's allegation that Adkinson perjured himself in his unnotarized affidavit. *See,* Application, Ex. A, ¶¶ 67-84. That allegation constitutes intrinsic fraud and cannot be the basis for an independent action under the *Daoud* rule.

In addition, the touchstone Michigan case articulating the difference between intrinsic and extrinsic fraud is *Columbia Casualty Co v Klettke*, 259 Mich 564, 565-66; 244 NW2d 164 (1932). In *Columbia Casualty*, a widow, Mae Klettke, pursued worker's compensation benefits following her husband's death. *Id.* at 565. The Department of Labor and Industry awarded Klettke compensation from her husband's employer and its insurer, and the award was affirmed. *Id.* In the original action, Klettke testified that she and her husband had been married in a ceremony in Indiana. *Id.* In reality, no formal ceremony had ever taken place. *Id.* Columbia Casualty, the employer's insurer, brought an action attacking the compensation award based on Klettke's alleged perjury regarding the marriage.

This Court would not let Columbia Casualty maintain its suit. The Court noted that perjury is not uncommon and that courts are constantly required to weigh testimony and determine who told the truth. *Id.* It stated the following:

> The courts hold that perjury is intrinsic fraud and that therefore it is not ground for equitable relief against a judgment resulting from it. We have seen that the fraud which warrants equity in interfering with such a solemn thing as a judgment must be fraud in obtaining the judgment, **and must be such as prevents the losing party from having an adversary trial of the issue. Perjury is a fraud in obtaining the judgment, but it does not prevent an adversary trial.** (emphasis added).

Id. at 565-566.

So perjury in general does not prevent an adversary trial as a matter of law, and the perjury alleged by Rodriguez in particular did not "prevent an adversary trial." The Sixth Circuit Court of Appeals already held in the 2009 Fraud on the Court Action, that **"Rodriguez has not**

alleged a plausible claim that the actions of defendants prevented him from bringing his claims before the court [in the Employment Litigation] as he acknowledges that he objected to the affidavit during the hearing on the motion for summary judgment and was subsequently able to cross-examine Adkinson at trial in August 2008 regarding the substance of the affidavit. . . . [T]he status of the Adkinson affidavit was not hidden from judicial view. In addition, Rodriguez's counsel was able to cross-examine Adkinson at trial, thus revealing any conflicting testimony to the same district court that had previously affirmed the bankruptcy court's summary judgment order. " Application, Ex. D, pp. 9-10 (emphasis added).

In addition, the fact that the court entered summary judgment on some of the Rodriguez estate's claims in the Employment Litigation does not mean that the alleged perjury prevented Rodriguez from having an "adversarial trial." The case law is clear that in instances where the allegedly defrauded parties received even *less* of an opportunity to air their grievances than Rodriguez, courts still hold that the alleged frauds are intrinsic and the parties are not thereby denied adversarial trials. *See*, *Triplett*, 444 Mich at 173 (intrinsic fraud - underlying proceeding was entry of settlement and dismissal of action); *Sprague*, 213 Mich App at 312 (intrinsic fraud - underlying action was default judgment in summary possession action); *Hart v Hart*, No 302111, 2012 Mich App LEXIS 571, at *1 (March 27, 2012) (intrinsic fraud - underlying action was default divorce judgment); *Kraniak v Fox*, No 253162, 2005 Mich App LEXIS 1813, at *1 (August 2, 2005) (intrinsic fraud - underlying action was entry of a settlement agreement). Unlike the plaintiffs in these cases—none of which permitted an independent fraud action—Rodriguez actually appeared in front of the court in an adversarial capacity and raised the issues

concerning the affidavit, as noted above by the Sixth Circuit. The rule of *Daoud* bars Rodriguez's complaint.

The exact same result applies under federal law. In *Cleveland Demolition Co v Azcon Scrap Corp*, 827 F2d 984 (CA 4, 1987), a litigant disgruntled with the results of litigation alleged an independent action in equity to set aside the result under Fed R Civ P 60. The litigant alleged that its adversary's attorney conspired with a witness to present perjured testimony, based upon an evidentiary conflict involving the witness' testimony. The court held that this "**routine evidentiary conflict does not justify an action for fraud on the court or the serious allegations of attorney misconduct leveled in this case.**" *Id.* at 985 (emphasis added). "[I]f a losing party could attack a verdict whenever two witnesses disagreed and an attorney was involved, no verdict would be final." *Id.* at 986. "Losing parties could transform a perjury case into an action for fraud on the court simply by alleging that an attorney was present." *Id.* at 987.

> Not only does this argument fail to establish any evidence of a fraud on the court, but it seriously undermines the principle of finality. **If a routine evidentiary dispute, which occurs in virtually all trials, could justify an action for fraud on the court, then any losing party could bring an independent action to set aside the verdict, forcing extended proceedings in almost every case.** Because Rule 60(b) imposes no time limit on these independent actions, they could be brought at any time. Thus, under Cleveland's version of the doctrine, no verdict would ever be final until a second proceeding was held to determine if there was a fraud on the court.
>
> **Rather than unravel the finality of judgments through the abuse of Rule 60(b), we adhere to the well-established rule that evidentiary conflicts must be resolved during the initial trial. . . . A complaint of this nature has a potentially devastating impact upon professional reputations.**

Id. at 987 (emphasis added). *See also, Fox v Elk Run Coal Co,* 739 F3d 131, 134-137 (CA 4, 2014) (No subsequent or independent fraud action allowed where discovery of earlier deception in court proceedings occurred. Even perjury and fabricated evidence do

not permit relief for fraud on the court because the legal system encourages and expects litigants to root them out as early as possible.).

The heart of Rodriguez's complaint is the allegation that Adkinson, with the assistance of FedEx's counsel, filed an unnotarized and false affidavit with the court, thereby committing perjury in the Employment Litigation. This is not sufficient to maintain an independent action of fraud on the court as a matter of law. Although a Rule 60(b)(3) motion provides relief for *both* intrinsic and extrinsic fraud, relief will be granted under Rule 60(d) (independent action) only for fraud that is extrinsic. *2300 Elm Hill Pike, Inc v Orlando Residence, Ltd*, No 97-6176, 1998 US App LEXIS 29576, at *5 (CA 6, Nov 16, 1998). "Extrinsic fraud is conduct which prevents a party from presenting his claim in court." *Id.*, quoting *Wood v McEwen*, 644 F2d 797, 801 (CA 9, 1981). "An allegation of perjury does not raise an issue of extrinsic fraud and thus does not support an independent action for relief from judgment." *Id.* (citations omitted).

The bar on relief for intrinsic fraud means that perjury at trial or in discovery proceedings or presentation of false documents in evidence may not be the basis of an independent action in equity. *See*, *United States v Throckmorton*, 98 US 61, 66 (1878) ("[R]elief has been granted, on the ground that, by some fraud practised directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court. On the other hand, the doctrine is equally well settled that the court will not set aside a judgment because it was founded on a fraudulent instrument, or perjured evidence, or for any matter which was actually presented and considered in the judgment assailed."); *Geo P Reintjes Co v Riley Stoker Corp*, 71 F3d 44, 49 (CA 1, 1995) ("[P]erjury alone . . . has never been sufficient" to support an independent action for relief from judgment); *Great Coastal Express, Inc v International Brotherhood of Teamsters,* 675 F2d 1349, 1358 (CA 4, 1982)("it is clear that

perjury and false testimony are not grounds for relief in an independent action in the Fourth Circuit"); *Travelers Indemnity Co v Gore*, 761 F2d 1549, 1552 (CA 11, 1985) ("Perjury is an intrinsic fraud which will not support relief from judgment through an independent action.").

Where only fraudulent evidence or perjury is alleged, an independent action for fraud on the court cannot be maintained, since it did not prevent a party from raising a claim. *See, e.g., Palkow v CSX Transp, Inc,* 431 F3d 543, 547 (CA 6, 2005) ("Allegations of perjury, like those advanced by [plaintiff], are insufficient to support an independent action for relief from judgment."); *HK Porter Co, Inc v Goodyear Tire & Rubber Co*, 536 F2d 1115, 1118 (CA 6, 1976) (the alleged perjury of a witness is not grounds for an action of fraud upon the court). Here, Rodriguez's entire complaint is based upon alleged perjury by Adkinson. The federal district court and Sixth Circuit actually involved in the underlying case found no fraud on the court. *See,* Application, Ex. D. Rodriguez's complaint based upon perjury is insufficient as a matter of law and it was properly dismissed here.

Rodriguez has previously attempted to get around this fatal defect by arguing that attorney Brodeur was also involved so it is perjury with the aid of a lawyer and that is somehow different. (Ex. U, pp. 11-14.). *Daoud* dispels any such argument. The rule from *Daoud* is that a subsequent fraud suit "may not be filed against a person **involved** in a first suit, if the statutes and court rules provide an avenue for bringing the fraud to the attention of the first court and asking for relief there." *Daoud,* 455 Mich at 203 (emphasis added). In *Daoud* itself, Daoud added VandeWaa and Bethany Christian Services as defendants in his fraud suit, yet this Court still found his claims were barred because his relief should have been pursued through the court rules in the first suit. Lower courts have recognized and applied the rule consistent with *Daoud*. *See, e.g., Janson v Janson*, No 236676, 2003 Mich App LEXIS 1873, at *7 n 6 (Aug 7, 2003)

("The court rules provided plaintiff with an effective remedy in the underlying case. In *Daoud*, our Supreme Court declined to recognize a new cause of action for fraud **notwithstanding that the plaintiff added defendants to the fraud action**.") (emphasis added). Losing parties cannot "transform a perjury case into an action for fraud on the court simply by alleging that an attorney was present." *Cleveland Demolition Co*, 827 F2d at 987.

Not only was an avenue available to Rodriguez under the statutes and court rules to bring the alleged perjury, fraud, misrepresentation, and any alleged misconduct to the attention of the judge, but Rodriguez availed himself of that avenue at every turn in the underlying proceedings. In the Employment Litigation, he objected to the affidavit at the summary judgment hearing and repeatedly thereafter, cross-examined the affiant about the affidavit, and briefed and argued to numerous courts that the allegedly perjured affidavit and alleged misconduct were grounds for relief. Application, pp. 4-8. When none of that was successful, he pursued another available avenue for relief in his unsuccessful 2009 Fraud on the Court Action alleging and arguing perjury, fraud, misrepresentation, forgery and misconduct. Application, pp. 8-10. Rodriguez's latest complaint in the instant action is barred under the rule of *Daoud*.

That one of Rodriguez's claims here purports to seek relief for fraud and the other for abuse of process does not bring this case outside the rule from *Daoud*, because courts look beyond the labels attached to a claim. "It is well settled that the gravamen of an action is determined by reading the complaint as a whole and by looking beyond mere procedural labels to determine the exact nature of the claim." *Adams v Adams*, 276 Mich App 704, 710-711; 742 NW2d 399 (2007). Courts have held that an abuse of process claim may be barred where it essentially pleads issues of fraud already raised and decided in prior litigation between the same

parties. *See*, *Seba v Dep't of Envtl Quality*, No 286759, 2009 Mich App LEXIS 2056, at *9, 15-16 (Sept 29, 2009).

Daoud is also instructive on this point. Daoud's complaint in the subsequent action alleged, in addition to fraud and fraudulent concealment, negligence and denial of his civil rights. *Daoud*, 455 Mich at 192. Yet this Court declined to give these separate claims separate treatment. All of Daoud's claims were ultimately based on the alleged perjury before the probate court. Rodriguez's abuse of process claim alleges nothing more than the same allegations of fraud based upon alleged perjury that he had the opportunity to bring to the attention of the original courts, he actually did bring to the attention of those courts numerous times, and upon which he was unsuccessful.

Nor does it matter whether the relief or remedy being sought from a judgment is equitable or legal; the rule of *Daoud* still applies. Justice Levin recognized this premise in *Triplett*, stating that the teachings from *Columbia Casualty* were "applicable in an action at law as an action in equity[.]" *Triplett*, 444 Mich at 186 (Levin, J, Concurring). Subsequent courts have followed Justice Levin's instruction. Indeed, while the plaintiff in *Triplett* sought damages, the *Daoud* Court applied *Triplett* to a case in which the plaintiff sought equitable relief. And courts since *Daoud* have, in turn, applied the rule to cases in which the plaintiffs sought damages. *See*, *Kettler v Fleming*, No 212736, 2000 Mich App LEXIS 2085, at *2 (March 3, 2000) (plaintiff's claim—barred under *Daoud*—sought damages for costs and fees occurred because of alleged fraud); *Powell Production, Inc v Butcher*, No 231626, 2003 Mich App LEXIS 645, at *3-4 (March 13, 2003) (plaintiff's claims—barred under *Daoud*—sought damages for fraud, despite discovery sanctions having already been assessed). Rodriguez's damage claims alleging **fraud and abuse of process are barred by the rule from *Daoud*.**

D. *Daoud* Is Dispositive And Bars Rodriguez's Claims Based Upon Alleged Forgery

Rodriguez is expected to argue that the notarized version of Adkinson's affidavit was allegedly forged. He will argue that this constitutes extrinsic fraud, and thereby avoids the *Daoud* rule, which he will argue only applies to intrinsic fraud. That argument is unavailing, as the alleged forgery is also intrinsic fraud covered by the *Daoud* rule.

As a threshold matter, Adkinson testified and confirmed at the Employment Litigation trial that: (1) he signed the unnotarized version of his affidavit shown to him by Rodriguez's counsel during trial; and (2) the statements, **identical in the unnotarized and notarized affidavits**, were true. (Application, Ex. J, pp 58-59). So the forgery allegation is a ruse invented by plaintiff. Rodriguez's counsel could have also shown the notarized affidavit to Adkinson at the trial and simply asked if it was Adkinson's signature on the notarized version, but Rodriguez's counsel did not do so. Moreover, if Rodriguez believed the affidavit was forged, he could have also obtained a handwriting expert at any time to examine it after the day Rodriguez received it in 2005 during the Employment Litigation. In any event, Rodriguez had an avenue for bringing the alleged forgery to the attention of the court in the Employment Litigation, but he did not do so. *See,* Application, pp. 6-7. He also had an avenue for bringing it to the court's attention in the 2009 Fraud on the Court Action, and he availed himself of that avenue by actually bringing it to the court's attention. Application, p. 9. Under *Daoud*, he cannot now claim the alleged forgery as a basis for his alleged fraud and abuse of process claims here.

In addition, an alleged forged document used in an underlying case also constitutes intrinsic fraud and cannot be the premise of an independent claim. Intrinsic fraud includes "perjury, discovery fraud, fraud in inducing [a] settlement, or fraud in the inducement or execution of [an] underlying contract." *Sprague*, 213 Mich App at 314; *Vader v Vader*, No

246878, 2004 Mich App LEXIS 1347, at *2 (May 27, 2004); *Kettler*, 2000 Mich App LEXIS 2085, at *5.

For purposes of not allowing a collateral action based on fraud, forgery has been grouped with perjury by this Court. In *Columbia Casualty*, this Court affirmed that, "In accordance with the principles laid down above, it is held, by the weight of authority, that neither perjury **nor forgery** is sufficient ground for equitable interference." *Columbia Casualty*, 259 Mich at 566-67. Likewise, Supreme Courts from many others states, and other courts, have overwhelmingly held that an alleged forgery is an intrinsic fraud. *See, Auerback v Samuels*, 10 Utah 2d 152, 155; 349 P2d 1112 (1960) ("[Intrinsic fraud] may be accomplished by perjury, or by the use of false or **forged** instruments, or by concealment or misrepresentation of evidence."); *Jones v Willard*, 224 Va 602, 607; 299 SE2d 504 (1983) ("The judgment of a court, procured by *intrinsic* fraud, *i.e.*, by perjury, **forged** documents, or other incidents of trial related to issues material to the judgment, is *voidable* by direct attack at any time before the judgment becomes final; . . . ."); *Kachig v Boothe*, 22 Cal App 3d 626, 634 (1971) ("California cases uniformly hold that the introduction of perjured testimony or **false documents** in a full litigated case constitutes intrinsic rather than extrinsic fraud."); *Hammell v Britton*, 19 Cal 2d 72, 82; 119 P2d 333 (1941) ("The fraud sufficient to justify equitable relief from a judgment must be extrinsic or collateral to the questions examined or determined. . . . [E]quitable relief from a judgment arising out of a contested action will not be granted merely because it was obtained by perjured testimony or **forged** documents; that constitutes intrinsic fraud . . . ").[2]

[2] *See also, Horne v Edwards*, 215 NC 622, 625; 3 SE2d 1 (1939) ("Intrinsic fraud, as for example, perjury, or the use of **false or manufactured evidence**, has no such effect."); *Associated Eng'rs & Contractors v State*, 58 Haw 187, 221; 567 P2d 397 (1977) ("[T]he introduction of perjured testimony or **forged** documents . . . constitutes intrinsic fraud.") (quoting *Brady v Beams*, 132 F2d 985, 986-87 (CA 10, 1943)); *Black v Black*, 166 SW3d 699,

The alleged bases for Rodriguez's complaint here are alleged intrinsic frauds – alleged perjury, misrepresentations, and forgery. Under *Daoud,* such intrinsic fraud cannot be the subject of an independent action. Rodriguez's complaint was properly dismissed by the trial court.

E. Even If Extrinsic Fraud Were Alleged, The Rule Of *Daoud* Still Bars Rodriguez's Claims

The *Daoud* Court expressly reserved for another day the question of whether it applied to extrinsic fraud. *Daoud*, 455 Mich at 203 n 31 ("We express no opinion about whether Mr. Daoud established that there was an *extrinsic* fraud that prevented him from effectively contesting the termination of his parental rights in an adversarial proceeding, or whether such a fraud would allow him to bring an independent action for money damages."). Because Rodriguez's instant case only alleges intrinsic fraud, this Court does not need to reach the question not answered in *Daoud*. But, in any event, the teaching from *Daoud* combined with the language of the court rules should apply regardless of the type of fraud.

703-04 (Tenn, 2005) ("Intrinsic fraud . . . includes such things as falsified evidence, **forged** documents, or perjured testimony."); *Mauer v Rohde*, 257 NW2d 489, 496 (Iowa, 1977) ("Intrinsic fraud 'occurs within the framework of the actual conduct of the trial and pertains to and affects the determination of the issue presented therein. It may be accomplished by perjury, or by the use of false or **forged** instruments . . . .'") (quoting *Auerback*, 10 Utah 2d at 155); *Donovan v Miller*, 12 Idaho 600, 607; 88 P 82 (1906) ("[W]e think it is settled beyond controversy that a decree will not be vacated merely because it was obtained by **forged** documents or perjured testimony. The reason of the rule is that there must be an end of litigation[.]"); *Moser v Fuller*, 107 Mont 424, 430-431; 86 P2d 1 (1938) (stating that a judgment will not be set aside merely because the offending party "procured his judgment upon a **forged** instrument or by the use of perjured testimony or other similar fraud"); *Brady v Beams*, 132 F2d 985, 987 (CA 10, 1942) ("[T]he introduction of perjured testimony or **forged** documents . . . constitutes intrinsic fraud."); 30 Am Jur 2d Executions and Enforcement of Judgments § 729 ("Examples of intrinsic fraud include perjury, misrepresentations at trial, and the use of **forged** or unauthenticated documents."); 47 Am Jur 2d Judgments § 696 ("Intrinsic fraud occurs within the subject matter of the litigation, and it includes such things as falsified evidence, **forged** documents, or perjured testimony.").

The ultimate thrust of *Daoud* is that a separate action cannot be maintained "if the statutes and court rules provide an avenue for bringing the fraud to the attention of the first court[.]" *Id.* at 203. This can be broken into a two-part inquiry: (1) do the rules cover the alleged fraud, and (2) is there an opportunity to bring it to the attention of the first court.

The first inquiry is satisfied in this case. Both MCR 2.612(C)(1)(c) and FRCP 60(b)(3) expressly state that a motion for relief from judgment can raise intrinsic **or extrinsic** fraud as a basis for relief. Thus, the rules clearly contemplate extrinsic fraud. In addition, Rodriguez actually brought his independent 2009 Fraud on the Court Action in federal court alleging fraud on that court, in which he could have also alleged the fraud and abuse of process claims he alleges here. So there was this additional avenue to bring his allegations to the attention of the court and he actually availed himself of it. This is after Rodriguez already raised in the Employment Litigation the issues of perjury and misconduct concerning the affidavit that he complains about here. *See,* Application, pp. 4-8. Even if the alleged forgery constituted extrinsic fraud, clearly an opportunity existed to bring it to the attention of the original court. In fact, Rodriguez *did* bring it to the court's attention. *See,* Application, Ex. E.

Neither *Columbia Casualty*, *Daoud* nor *Triplett* put significant emphasis on the intrinsic versus extrinsic distinction. The focus is merely on whether the rules provide an avenue for relief, and whether the aggrieved party could have brought his claim before the original court. *See*, *Smith v Smith*, No 251773, 2005 Mich App LEXIS 990, at *8 (April 19, 2005) (describing *Daoud*, and not using the words intrinsic or extrinsic in its opinion: "When a plaintiff who alleges fraud could have resolved the issue in the original proceedings or through MCR 2.612, the court will not allow any independent actions for fraud to proceed.").

Rodriguez had a chance, and actually tried, to resolve the same issues he raises here before the courts in the original proceeding, and through Fed R Civ P 60, but he lost. *See,* Application, Ex. D. This Court should not allow this independent action to proceed, regardless of the labels that Rodriguez now attaches to his allegations. The *Daoud* rule prevents an independent action for the claims alleged here by Rodriguez.

III. CONCLUSION AND RELIEF REQUESTED

Defendants request that this Court enter a peremptory order based upon *Daoud* vacating the Michigan Court of Appeals decision, and reinstating the trial court's dismissal of the plaintiff's complaint with prejudice. If this Court is inclined to address *Pierson* and the res judicata, collateral estoppel, and other issues of law briefed in the Application of Defendants-Appellants, defendants request that the Court issue an opinion consistent with that Application reversing the Michigan Court of Appeals and reinstating the trial court's dismissal of the plaintiff's complaint with prejudice. If this Court has any doubts about reversing the Michigan Court of Appeals and reinstating the trial court's dismissal with prejudice, then Defendants-Appellants request that the Court grant their Application for leave to appeal so that the issues can be addressed in as thorough a manner as possible.

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